

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION  
SECOND APPEAL NO. 1357 OF 2004

Shankar Mahadu Palde & ors.                                 ..Appellants

versus

Sou. Chandrabhaga Arjun

Mondhe, and Ors.                                                 ..Respondents

Mr. P. N. Joshi for the Appellants.

Mr. R. V. More for the Respondents.

**CORAM : D. G. DESHPANDE, J.**  
**DATE : 24TH AUGUST, 2005**

**ORAL ORDER :**

1. Heard learned counsel for the appellants and the respondents.
2. Appellants are the original defendants. Plaintiffs Chandrabhaga and Janabai filed a suit for partition of the property claiming one half share. That suit was contested by the present appellants mostly on the ground that the property was not purchased by their father from ancestral income or ancestral property, that the plaintiffs were not legitimate children because they were born to

Gangubai from the deceased Mahadu from illicit relations. The trial court decreed the suit partly and granted 1/5th share to each of the parties including the plaintiffs. The defendants preferred an appeal to the District Judge, Nashik, but the appellate court dismissed and upheld the judgment of the trial court, hence this Second Appeal.

3. Counsel for the appellants tried to contend that there were three substantial questions of law involved. First contention of the counsel for the appellants that even according to the plaintiff and as per the plaint the suit property was joint family property and this fact is reiterated by the defendants in their written statement. the appellate court erred in coming to the conclusion that it was a self acquired property of Mahadu. He also contended that it was the case of the appellants in the written statement that Mahadu purchased this property from out of the nucleus of the joint family and therefore it was not a personal property of Mahadu. My attention in this regard was drawn by the counsel for the appellant to the pleadings of the parties and the evidence.

4. Unfortunately for the appellant this submission is not factually borne out. In order to ascertain the case of the plaintiff the entire

plaint has to be considered and not only paragraph 2 of the plaint to which my attention was drawn. In paragraph 2 of the plaint, it is stated that the property described in paragraph 1 is the property of the joint family of the plaintiff and defendant and it is the ancestral. The actual wording in Marathi is "Vadil Malkicha Milkati". If this was the only plea of the plaintiff then the contention of the defendants advocate was liable to be accepted. But that is the not the case. (Paragraph 3 of the plaint or paragraph 2). If the aforesaid allegations are material in the same paragraph the plaintiff has written a genealogical tree of the plaintiff and defendant, then the genealogy tree starting from the plaintiff and the defendant's common father Mahadu is given. The names of his two wives are given and thereafter the names of all the plaintiffs and defendants given and then it is stated that this is a genealogical tree of the plaintiff and the defendant and then in paragraph 3 it is stated that this is an ancestral property.

5. There is no reference anywhere in the plaint to any other ancestral of Mahadu. Therefore, the clear case of the plaintiff is that it is from Mahadu that this property came into picture and when the word "Vadilopad" or ancestral is used it does not refer to the ancestral of Mahadu but the

ancestor of the plaintiff and defendant i.e. Mahadu. Therefore, it cannot be said that plaintiffs have come with a case that the property was ancestral in the hand of Mahadu. The clear case of the plaintiff is that it is a property of Mahadu and after the death of Mahadu it is ancestral for them.

6. In this background if the written statement is perused, the appellants - defendants have alleged that property was purchased in the name of Mahadu from out of the sale proceeds and the property which was ancestral for Mahadu. Now this is never allegation in the written statement that no proof whatsoever in the form of documents showing existence of some ancestral property of the ancestor of Mahadu, therefore, this is a case where though the defendants have raised a particular plea of the property being ancestral even for Mahadu there is no evidence at all worthy of consideration. Therefore, this contention is required to be rejected.

7. Secondly, according to the appellants if the property was ancestral then there would be notional partition at the time of death of Mahadu and the respondents - plaintiffs would be entitled to 1/15th share but when an earlier contentions required to be rejected, and is rejected, this contention is not

required to be considered at all. If the property was a self acquired property of Mahadu then after his death all his heirs will get equal share.

8. Thirdly it was tried to be contended that the original plaintiffs - respondents were the illegitimate children of Mahadu and the trial court has given clear finding in that regard. The appellate court wrongly came to the conclusion that the plaintiffs were not illegitimate children. The trial court gave a finding of the plaintiffs being illegitimate children because according to the trial court the plaintiffs could not prove their mother was legally wedded wife of Mahadu. This approach of the trial court is totally wrong because Mahadu died. After the death of Mahadu since 1981 the names of the plaintiffs came to be recorded in 7/12 extract as legal heirs of Mahadu. Suit was filed by the plaintiffs in 1996 and there is nothing on record to show that from 1981 to 1996 the appellants ever took any objection about the validity of the plaintiffs in the 7/12 extract as legal heirs of Mahadu. They never challenged the status of the plaintiffs as legitimate children and therefore now the defence raised in the written statement is an after thought to deprive the plaintiffs of their legitimate right. The appellants have merely alleged that plaintiffs mother was mistress of

Mahadu in 1948 but when the mother was living with Mahadu and when the appellate court has found that the plaintiffs were either born in 1938 and not in any case after 1943 and their name is recorded in the 7/12 extract for such a long time then the appellate court was fully justified in coming to the conclusion that the plaintiffs are legitimate children of Mahadu.

9. The entire case of the parties rest on two issues, viz. the property was a self acquired property of Mahadu or ancestral and when the finding on these aspects is to be recorded in favour of the original plaintiffs from the aforesaid pleadings, and I have done so, and when secondly the appellate court was fully justified in holding that plaintiffs were the legitimate children then the judgment and decree of the appellate court cannot be interfered with and even for that matter 1/5th share granted to the plaintiff by the trial court . The observation and the finding of the court is not required to be interfered with, there is no merit in this appeal, the same is dismissed.

